No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA

AND

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS

AND

TEXAS DEPARTMENT OF HUMAN RESOURCES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

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Respondents do not dispute the existence of a square conflict among the six courts of appeals that have decided the precise question presented in this case. Instead, they assert that the decision of the Fifth Circuit below was correct, and that this Court should therefore deny certiorari despite the acknowledged and widening circuit conflict over a concededly important question involving substantial sums of money and potentially affecting a wide array of federal-state cooperative grant programs. Even if respondents were correct in their contention that pre-

judgment interest is not due in the circumstances of this case, review would be warranted to resolve the conflict, because the present state of the law leaves the federal government free to collect prejudgment interest from some States but not from others.[1] For the reasons set forth below, moreover, respondents' attempt to defend the Fifth Circuit's decision is unpersuasive.

1. Respondents contend that their obligation to reimburse the United States for mail issuance losses is not a contractual debt at all, but is instead a "penalty" imposed unilaterally and arbitrarily by the Secretary of Agriculture. Br. in Opp. 4-5. As a result, respondents assert, no interest is due in this case, because "penalties" are not subject to prejudgment interest. *Id.* at 5 (citing *Rodgers* v. *United States*, 332 U.S. 371, 374-376 (1947)). That contention is incorrect.

a. The State of Texas voluntarily chose to participate in the Food Stamp Program,[2] and by doing so it

[1] For that reason, respondents err in suggesting (Br. in Opp. 5) that the Court need not grant review in this case because the threshold issue of the proper classification of their debt may prevent the Court from resolving the question whether the Debt Collection Act of 1982 abrogated the federal government's common-law right to prejudgment interest. The circuits are divided over the ability of the United States to collect prejudgment interest from the States in precisely the circumstances of this case, so the Court's resolution of this case, even on the ground urged by respondents, would necessarily resolve that conflict.

[2] State participation in the Food Stamp Program is not mandatory, but is encouraged by the generous federal benefits provided under the program. In general, the federal government pays for the entire cost of the food stamps provided to program beneficiaries and, in addition, substantially underwrites the expenses incurred by the States in administering the program. See 7 U.S.C. 2025.

contractually bound itself to comply with the federal regulations governing the program. Pet. 3-4; Br. in Opp. 1. States participating in the program, including Texas, are required to sign a "Federal/State Agreement," which is "the legal agreement between the State and the Department of Agriculture" and "is the means by which the State elects to operate the Food Samp Program." 7 C.F.R. 272.2(a)(2). Pursuant to the express terms of the Federal/State Agreement, each State and the Department of Agriculture contractually agree "to act in accordance with the provisions of the Food Stamp Act of 1977, as amended, [and its] implementing regulations * * *. The State and [the Department] further agree to fully comply with any changes in Federal law and regulations." 7 C.F.R. 272.2(b)(1). Thus, the federal Food Stamp Program regulations, and all amendments thereto, are expressly incorporated as terms of the contract between the federal government and each State that participates in the program.

The mail loss tolerance regulations applied in this case were adopted on an interim basis on November 9, 1982 (see 47 Fed. Reg. 50,681), and in final form on April 8, 1983 (see 48 Fed. Reg. 15,223). The mail issuance losses at issue here did not occur until 1986. Pet. 4. Thus, at the time those mail issuance losses were incurred, the contract between respondents and the United States expressly provided that respondents would reimburse the United States for all such losses in excess of the regulatory tolerance level.[3] Respondents' attempt to deny the contractual nature of their debt is without foundation.

[3] Contrary to respondents' assertion (Br. in Opp. 4), there was nothing "arbitrary" about the tolerance level selected by

b. Nor are respondents correct in asserting that their liability for excessive mail losses constitutes a "penalty" that is exempt from prejudgment interest under *Rodgers* v. *United States*, 332 U.S. 371 (1947). In *Rodgers*, the federal government imposed civil penalties on a farmer who marketed cotton in excess of his statutory quota, and sought to collect prejudgment interest on the penalty amount. The Court held that those penalties were more analogous to criminal fines—which do not accrue prejudgment interest—than to more traditional financial obligations, and accordingly declined "to add [prejudgment] interest to th[e] very substantial penalties already imposed upon non-cooperating farmers." 332 U.S. at 376.

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the Secretary of Agriculture. This regulatory limit was adopted only after an exhaustive and meticulous examination of the matter in public rulemaking proceedings conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 553. The tolerance level was based upon an examination of historical mail loss data which suggested that a mail loss limit of 0.5% would be a "realistically attainable goal." 47 Fed. Reg. 50,682 (1982). Challenges to the validity of the mail loss tolerance level have been unanimously rejected by the courts. See *Arkansas* v. *Block*, 825 F.2d 1254, 1256-1257 (8th Cir. 1987); *Gallegos* v. *Lyng*, 891 F.2d 788, 792 (10th Cir. 1989).

Moreover, respondents are estopped from asserting that the mail loss tolerance level was "arbitrary." Respondents were entitled to seek judicial review of the Secretary's mail loss regulation, and indeed they initially challenged the tolerance level on the ground that it was not "based on any empirical evidence." C.A. Record 8. Thereafter, however, respondents expressly disclaimed any challenge to the validity of the regulations. Pet. App. 16a. Having deliberately abandoned their contention that the mail loss tolerance level was set arbitrarily by the Secretary, respondents should not be permitted to resurrect that contention here.

This case, by contrast, involves the recoupment pursuant to contract of actual financial losses suffered by the federal government, not the imposition of civil fines or penalties for the sole purpose of punishing prohibited conduct. The mail loss tolerance regulations do not impose penalties. Rather, they simply allocate to the States certain financial losses that result from the operation of the Food Stamp Program—losses that would otherwise be borne exclusively by the federal government, which is obligated to replace lost food stamp coupons. See 7 U.S.C. 2013, 2016; Pet. 3 n.2. Since respondents' debt is a contractual obligation rather than a civil fine, imposition of prejudgment interest is appropriate. *West Virginia* v. *United States*, 479 U.S. 305, 310 (1987) ("[P]arties owing debts to the Federal Government must pay prejudgment interest *where the underlying claim is a contractual obligation to pay money.*") (emphasis added).[4]

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[4] Respondents also err in contending (Br. in Opp. 11) that imposition of interest on their debt pending administrative appeal and judicial review would be "inequitable." Prejudgment interest serves to maintain the real value of the debt so that neither party to the dispute benefits from a delay in payment. Imposition of prejudgment interest is in keeping with the "dictate[s] of natural justice, and the law of every civilized country," *Curtis* v. *Innerarity*, 47 U.S. (6 How.) 146, 154 (1848), and with "the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." *Rodgers* v. *United States*, 332 U.S. at 373. Indeed, the *failure* to impose prejudgment interest would result in inequity under the circumstances of this case, because it would reward respondents for their unjustified delay in payment while effectively penalizing the taxpayers of those States that promptly paid their Food Stamp Program debts. Thus, imposition of prejudgment in-

2. Respondents assert (Br. in Op. 6-14) that the Debt Collection Act of 1982 abrogated the federal government's preexisting common-law right to collect prejudgment interest on debts owed by state and local governments. As respondents concede, however, only where Congress has "spoke[n] directly to a question" will congressional enactments be deemed to have supplanted the common law. Br. in Opp. 9 (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 315 (1981)). Thus, recourse to federal common law is inappropriate where a federal statute or regulatory scheme establishes a legal standard that provides an answer to the precise question at issue. See *City of Milwaukee*, 451 U.S. at 317-326; *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 623-626 (1978). But where Congress has declined to legislate with respect to a particular question, reference to federal common law is appropriate to "fil[l] a gap left by Congress' silence." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. at 625; see also *City of Milwaukee*, 451 U.S. at 323, 324-325 n.18.

The Debt Collection Act does not speak directly to the question of the federal government's right to prejudgment interest on debts owed by state and local governments; instead, it merely exempts those entities from the Act's provisions for prejudgment interest and says nothing whatsoever about the propriety of collecting such interest under the common law. Accordingly, recourse to federal common law is required to "fil[l] [the] gap left by Congress' silence." *Mobil Oil Corp.*, 436 U.S. at 625.

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terest on respondents' debt is clearly called for, because "fully repaying the Federal Government * * * will [f]ther the distribution of the burdens * * * that Congress intended." *West Virginia* v. *United States*, 479 U.S. at 310-311.

Respondents nonetheless suggest that Congress could not have intended to exempt the States from the Act's "elaborate debt collection regimen that includes the imposition of prejudgment interest" only to expose the States "silently to the same liability of prejudgment interest pursuant to prior common law." Br. in Opp. 13. What respondents ignore, however, is the fact that the States' liability for prejudgment interest at common law is not coterminous with the provisions of the Act. The Act establishes a mandatory prejudgment interest rate applicable to all debts owed the United States, and in addition requires imposition of processing charges and penalties on delinquent claims. 31 U.S.C. 3717(a) and (e). The common law, by contrast, is far more flexible, permitting the courts to look to "the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed" and the other "general principles deemed relevant by the Court" in determining whether to impose prejudgment interest. *Rodgers* v. *United States*, 332 U.S. at 373. Moreover, there is no common-law requirement that the States pay processing charges or penalties in addition to prejudgment interest. Congress could well have decided, in the interests of federalism and comity, to leave state and local governments subject to the more flexible, and less onerous, regime of the common law rather than subjecting them to the strict and mandatory requirements of the Debt Collection Act. See *Gallegos* v. *Lyng*, 891 F.2d 788, 798 (10th Cir. 1989).[5]

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[5] For essentially the same reason, respondents draw no support from their observation that Congress knows how to impose prejudgment interest on the States when it wishes to do so. Br. in Opp. 14. Respondents invoke the Medicaid Act, 42 U.S.C. 1396b(d)(5), and the Social Security Act, 42 U.S.C. 418(j) (1982), but those provisions merely codified particular

3. For the reasons stated in the petition (Pet. 13-14), respondents' reliance (Br. in Opp. 15-17) on *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), is misplaced. The federal government's consistent position that prejudgment interest may be imposed on debts owed by state and local governments was a matter of public record long before respondents incurred the debts at issue in this case,[6] as was the obligation of States to reimburse the federal government for mail issuance losses in excess of the regulatory tolerance level. See Pet. 12 (citing 49 Fed. Reg. 8894 (1984)); 48 Fed. Reg. 15,223 (1983). Had respondents wished to avoid the imposition of prejudgment interest on obligations incurred pursuant to the mail loss regulations, they could have done so by withdrawing from the Food Stamp Program prior to incurring those obligations. By failing to do so, respondents "voluntarily and knowingly accept[ed] the terms of the 'contract,'" *Pennhurst*, 451 U.S. at 17, and subjected themselves to the normal remedies available to the federal government when it seeks to enforce its contractual rights. See *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Having chosen to accept the substantial financial benefits provided by the federal government to the States pursuant to the Food Stamp Program, respondents cannot now be permitted to evade the federal government's efforts to enforce its contractual rights and remedies under that program.

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interest-computation arrangements to be applied in certain limited circumstances. They are not evidence of any legislative intention that, in their absence, there would be *no* interest available.

[6] Thus, respondents are clearly wrong to characterize the Department of Agriculture's application of this longstanding interpretation as "an ambiguous and devious *post hoc* imposition of a program liability on the States." Br. in Opp. 13.

4. The administrative agencies charged with implementing the Debt Collection Act have consistently taken the position that the Act does not abrogate the federal government's common-law right to collect prejudgment interest on debts owed by the States. Pet. 11-13. Respondents assert that judicial deference is not due to the contemporaneous agency interpretations of the Debt Collection Act because such deference "applies more appropriately to interpretations of policy issues and not of questions of law." Br. in Opp. 18. As this Court's cases make clear, however, deference is due to reasonable agency interpretations of statutes they are charged to administer, even where those interpretations involve "questions of law" rather than "policy issues." See, *e.g.*, *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-1402 (1992) (deferring to agency interpretation of statutory phrase). Because the administrative interpretation of the Act does not conflict with the Act's plain language, judicial deference is required. *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JULY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45497